

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
2000 Regulatory Review –)	
Comprehensive Review of the)	CC Docket No. 00-199
Accounting Requirements and)	
ARMIS Reporting Requirements for)	
Incumbent Local Exchange Carriers:)	
Phase 3)	
)	
Local Competition and Broadband Reporting)	CC Docket No. 99-301

**COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

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The National Cable & Telecommunications Association (“NCTA”), by its attorneys, respectfully submits the following comments in the above-captioned proceeding.

NCTA is the principal trade association of the cable television industry. Its members provide cable television and broadband Internet access services throughout the United States. The Commission’s resolution of this proceeding may significantly affect the terms under which cable systems offer services to their subscribers.

INTRODUCTION AND SUMMARY

NCTA supports in principle the further streamlining of ARMIS regulations and reporting requirements. NCTA understands that there may be new mechanisms to achieve greater efficiency in pole attachment and conduit regulation. At the same time, however, NCTA is concerned that changes in the ARMIS reporting regulations should not so disrupt existing Uniform System of Accounts (“USOA”) procedures that cable systems and other users of utility

poles and conduits are no longer able to rely upon ARMIS or pole rental formulas established in Section 224 of the Communications Act of 1934, as amended, and the Commission's regulations.

A clear, continuing federal need exists for maintaining reporting requirements for ARMIS accounts related to pole attachments. Cable systems need ARMIS to provide the data to support pole attachment and conduit rental rate calculations and adjustments, as well as for "last resort" cases where cable operators must file complaints seeking the Commission's determination of just and reasonable rates. Without ARMIS data, cable systems would have no ability to accurately calculate rental rates under the Commission's formulas and would be forced to generate pole attachment information to support individual complaints on a case-by-case basis. This requirement would be antithetical to facilities-based competition.

The competitive consequences of reducing the number of local exchange carriers subject to Class A reporting requirements would be quite serious. Poles and conduits constitute essential facilities upon which cable systems and other local exchange competitors rely in the provision of service. To date, no alternative regulatory or negotiating scheme exists upon which cable systems or competitive local exchange carriers could depend if the Commission eliminated the Class A ARMIS reporting requirements. Moreover, the elimination of accounting and reporting rules for pole-related accounts would conflict with congressional directives concerning pole attachments and the statutory goals underlying Section 224 of the Communications Act of 1934, as amended, which seek to ensure that pole attachment rates are just and reasonable.

In Phase 2 of this proceeding, the Commission addressed a proposal to eliminate pole/conduit-related accounts and wisely declined to take such action.¹ The Commission noted

¹ See 2000 Biennial Regulatory Review -- *Comprehensive Review of the Accounting Requirements and ARMIS Reporting Requirements for Incumbent Local Exchange Carriers: Phase 2, Report and Order*, 16 FCC Rcd. 19911, 19928, 19931 (2001) ("Phase II Report and Order").

the necessity of maintaining these accounts and making them publicly-available.² The need for these accounts has not diminished. Accordingly, NCTA urges the Commission to retain existing reporting requirements for ARMIS accounts used in the calculation of pole and conduit rental rates.

I. BACKGROUND ON POLE REGULATION

Since the passage of the Pole Attachment Act of 1978³ (the “Act”) and the adoption of the Commission’s implementing rules, all incumbent local exchange carriers (“ILECs”), including mid-sized ILECs, have been required to provide cable systems access to utility poles pursuant to just and reasonable rates, terms and conditions.⁴ Pole rates must be based upon the ILECs’ booked investments and expenses. If the Commission were to significantly reduce or eliminate the public availability of accounting detail, the agency’s highly effective pole attachment regulatory scheme would be placed at risk.

It has been well-established for many years that, as a result of franchise conditions, environmental and zoning laws, and other business circumstances, cable systems must utilize in virtually all cases poles owned or controlled by ILECs and electric utilities.⁵ The Act was adopted following a period when cable operators had been subjected to overcharges and other

² *See id.*

³ S. Rep. No. 95-580, at 21 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109, 129.

⁴ *See* 47 U.S.C. § 224; 47 C.F.R. §§ 1.1401-1.1418.

⁵ *See, e.g.*, 123 Cong. Rec. 35,006 (1977) (remarks of Rep. Broyhill, co-sponsor of Pole Attachment Law) (“The cable television industry has traditionally relied on telephone and power companies to provide space on poles for the attachment of CATV cables. Primarily because of environmental concerns, local governments have prohibited cable operators from constructing their own poles. Accordingly, cable operators are virtually dependent on the telephone and power companies. . . .”). *See also National Cable & Telecommunications Ass’n, Inc. v. Gulf Power Co.*, 122 S. Ct. 782, 784 (2002) (noting that “[s]ince the inception of cable television, cable companies . . . have found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles.”) (emphasis added); *FCC v. Florida Power*, 480 U.S. 245, 247 (1987) (holding that “[u]tility company poles provide, under such circumstances, virtually the only practical physical medium for the installation of television cables”).

abuses by utilities that feared potential competition.⁶ Regulation proved necessary because private negotiation failed and other remedies proved unsuccessful.

For the twenty years since the passage of the Pole Attachment Act and the adoption of the implementing rules, the Commission or the states have provided a forum for the adjudication of pole attachment complaints. In accordance with the Act, states exercise jurisdiction in the first instance. Where states choose not to regulate, the FCC takes over. In no case is a pole user entitled to relief under the Act left without a vehicle for adjudicating a complaint.

II. THE BENEFITS OF ARMIS IN POLE ATTACHMENT REGULATION

The ARMIS scheme as it relates to pole attachments has been developed in the course of several rulemakings and in the process of litigating numerous pole complaints. The Commission substantially reaffirmed the ARMIS scheme as it relates to pole attachments only two years ago.⁷ The Commission's formula largely relies on information that is publicly available from USOA Class A Account 2411. Poles are licensed for use "by the pole." Pole rental payments to the utility are determined by dividing a portion of the aggregate investment per bare pole by the number of poles. The aggregate pole investment is maintained in continuing property records and reported by ILECs in ARMIS.

Pole rental carrying charges are also determined on the basis of ARMIS data. For instance, the "pole maintenance" component of Account 6411 is segregated from the remainder of the account such that the rents ILECs pay to power companies are not imposed on cable

⁶ See, e.g., *Better T.V., Inc. of Dutchess County, NY v. New York Telephone Co.*, 31 F.C.C.2d 939 (1971) (disapproving of ILECs monopoly control over poles and preferential treatment of customers subscribing to its own common carrier channel service over cable operators attempting to build out their own facilities); *Communications Act Amendments of 1977; Hearings on S. 1547 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong. (1977). *Cable Television Regulation Oversight: Hearings Before the Subcomm. on Communications of the Comm. on Interstate & Foreign Commerce, Parts 1 & 2*, 94th Cong. (1976); *Pole Attachment: Hearings on H.R. 15372 and H.R. 15268 Before the Subcomm. on Communications of the House Comm. on Interstate & Foreign Commerce*, 94th Cong. (1976).

⁷ *Amendment of Rules and Policies Governing Pole Attachments*, 15 FCC Rcd. 6453 (2000).

operators. Cable operators pay these charges directly to power companies. ARMIS accounts should be maintained to ensure, among other things, against this form of double charging of pole rents.⁸

It is crucial that cable operators and others who rent utility pole space are able to continue to rely upon publicly available information to resolve the numerous issues that arise between pole owners and cable operators on a regular basis without having to resort to the Commission's complaint processes.⁹ Most significantly, the typical pole attachment agreement contemplates the annual recalculation of pole rates in light of increased utility costs. Neither party to the pole agreement generally resorts to the Commission's process to review these calculations. Rather, the parties have established detailed, private review procedures that apply the Commission's

⁸ In addition, NCTA requests that the Commission maintain reporting requirements for the following Part 32 Class A Accounts used in pole and conduit rental rate calculations, on both operating company and jurisdictional bases: Account 2001 - Telecommunications Plant in Service, Table B-1b; Account 2411 - Gross Investment in Poles, Table B-1b; Account 2441 - Gross Investment in Conduit, Table B-1b; Account 490 - Depreciation Reserve for Total Plant in Service, Table B-5; Account 390 (2411) - Depreciation Reserve for Pole Plant, Table B-5; Account 470 (2441) - Depreciation Reserve for Conduit, Table B-5; Account 2411 - Depreciation Rate for Poles, Table B-7; Account 2441 - Depreciation Rate for Conduit, Table B-7; Account 3100, Table B-5; Account 4100 - Accumulated Deferred Taxes, Table B1a; Account 4340 - Accumulated Deferred Taxes, Table B1a; Account 6411 - Pole Maintenance Expense, Table I-1; Account 6441 - Conduit Maintenance Expense, Table I-1; Account 6710 - Executive and Planning, Table I-1; Account 6720 - General & Administrative, Table I-1; Accounts 7210 to 7250 inclusive, Table I-1. From ARMIS Report 43-08: Equivalent Number of Poles, Table 1.A; Conduit System Trench Km, Table 1.A; Conduit System Duct Km, Table 1.A.

Furthermore, NCTA asks that the Commission retain the Class A reporting requirement of pole rental expenses, which reduces the pole owner's maintenance expense under Account 6411, including application to conduit if conduit rental expenses were included in Account 6441. This will avoid imposing on attaching parties a double charge for electric utility pole rents. Specifically, the costs of pole maintenance in Account 6411 are broken out so that the rents that ILECs pay to electric companies are not charged to cable operators, who directly pay electric companies for attachment to electric poles. Elimination of this reporting requirement would create the very double charge the Commission has found to be unjust. *See* Letter from Kenneth Moran to Paul Glist, 5 FCC Rcd. 3893 (1990). *See also In Re Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd. 6453 at 6482-83 (2000).

⁹ *See* 47 C.F.R. §§ 1.1404 – 1.1415.

formula to Class A ARMIS data, as set forth in the public reports. This procedure is used not only with respect to numerous states in which the Commission exercises jurisdiction over pole attachments, but also by many of the states that have decided to regulate attachments on their own.

Cable systems and other pole users, as well as pole owners and regulators, have found this process to be an efficient alternative to case-by-case adjudication. This “private” process is particularly useful in today’s increasingly competitive environment, in which ILEC competitors continue to rely on essential utility facilities.¹⁰

III. ARMIS DATA REMAIN CRITICAL COMPONENTS OF POLE ATTACHMENT PROCEEDINGS

Part 32 remains an essential resource for analyzing and policing ILEC pole rate practices. While advocates for a reduced role for ARMIS in pole attachment regulation previously argued that “Part 32 does not assist in preventing the possibility of anti-competitive behavior and it does not provide information that would be useful in a complaint proceeding,”¹¹ this assertion is incorrect. As established above, Part 32 accounts are used in complaint proceedings where pole attachment rental rates are at issue. In Phase 2 of this proceeding, the Commission properly recognized that “[r]eliance on publicly available information has allowed pole owners and attaching parties to resolve rate issues without Commission involvement, which is a cost-savings benefit to utilities, cable operators, other attaching parties, and the Commission.”¹² When faced with a proposal by the United States Telecom Association advocating elimination of pole account reporting under ARMIS, the Commission concurred with NCTA, stating: “[w]e agree

¹⁰ Indeed, the United States Supreme Court recently reaffirmed the fact that poles are essential. *See National Cable & Telecommunications Ass’n, Inc. v. Gulf Power Co.*, supra, 122 S. Ct. at 784.

¹¹ Comments of United States Telecom Association, *In re 2000 Regulatory Review – Comprehensive Review of the Accounting Requirements and ARMIS Reporting Requirements for Incumbent Local Exchange Carriers: Phase 2 and Phase 3*, CC Docket No. 00-199 (filed Dec. 21, 2000).

that these accounts are necessary and must be maintained and reported in ARMIS.”¹³ This need for continued reporting of these accounts has not abated.

Substantial modifications of the existing regime could effectively negate the pole attachment scheme. If proposed changes were adopted, ILECs might succeed in eradicating through the regulation process the pole attachment scheme that the electric utilities have been attempting to eviscerate through the FCC and the courts.¹⁴

The Commission has reproached electric utilities for engaging in practices of this sort.¹⁵ And the Federal Energy Regulatory Commission (FERC), which has the principal federal regulatory responsibility for overseeing electric utilities, has similarly determined that utility attempts to foreclose the public availability of the analogous data on FERC Form 1 is not acceptable.¹⁶ Proposals to eviscerate ARMIS in the name of generalized notions of efficiency or

¹² *Phase II Report and Order*, 16 FCC Rcd at 19928, 19931.

¹³ *Id.* at 19931-32, n.84.

¹⁴ *See National Cable Telecommunications Ass’n v. Gulf Power Co.*, 122 S. Ct. 782 (2002). *See also Teleport Communications Atlanta, Inc. v. Georgia Power Co.*, 16 FCC Rcd. 20238 (rel. Nov. 14, 2001) (finding Georgia Power’s unilateral pole attachment rate of \$53.35 per pole per year unlawful) (“*Teleport*”); *Alabama Cable Telecomm. Ass’n v. Alabama Power Co.*, 16 FCC Rcd. 12209 (rel. May 25, 2001), *appeal docketed*, *Alabama Power Co. v. FCC*, Docket Nos. 00-14763-I & 00-15068-D (11th Cir., Sept. 12, 2000) (finding Alabama Power’s pole attachment rate increase from \$7.37 to \$38.81 unlawful and ordering it to refund the amount of over charge) (*Alabama Cable Telecomm. Ass’n*); *Cable Television Association of Georgia v. Georgia Power Co.*, P.A. 01-002 (filed Jan. 17, 2001) (affirming the FCC’s authority to regulate “just and reasonable” rates for pole attachments by cable television systems providing commingled Internet service); *Florida Cable Telecomm. Ass’n v. Gulf Power Co.*, File No. P.A. 00-004 (filed July 10, 2000) *appeal docketed*, *Alabama Power Co. v. FCC*, Docket Nos. 00-14763-I & 00-15068-D (11th Cir., Sept. 12, 2000) (challenging unlawful pole attachment rate).

¹⁵ *See generally Teleport*, 16 FCC Rcd. 20238; *Alabama Cable Telecomm. Ass’n*, 16 FCC Rcd. 12209; *Cavalier Telephone, LLC v. Virginia Electric and Power Co.*, 15 FCC Rcd. 9563 (2000).

¹⁶ *See Letter from Douglas W. Smith, General Counsel, Federal Energy Regulatory Commission, to Ronnie R. Labrato, Gulf Power Company*, FERC RIMS DOC 2090351 (Sept. 14, 2000) (stating that “access to this type of information by the public helps in monitoring for possible abuses of market power and ensuring that rates are just, reasonable and not unduly discriminatory or preferential. The needs of the Commission and the public for accurate, timely data in a useable format—which Form 1 provides—outweigh any potential harm that might result from data disclosure.”).

deregulation do not withstand scrutiny when placed against the need to maintain an effective pole attachment/conduit regulatory regime. Similarly, proposals to shift account information to other reporting mechanisms are unlikely to achieve the desired result.

For example, the *Local Competition and Broadband Reporting* program is not the proper mechanism for collecting information for pole- and conduit-related accounts. The *Local Competition and Broadband Reporting* requirements focus only on basic information concerning the development of competition in local telephone service and broadband deployment. The current FCC Form 477 does not require reporting of any information corresponding to the Part 32 Accounts relevant to the pole attachment/conduit regulatory regime. Any modification to the *Local Competition and Broadband Reporting* program to include such accounts, if even possible, would be disruptive and administratively inefficient. Moreover, the Commission has simplified procedures by which filers may request confidential treatment of information filed in FCC Form 477.¹⁷ Such requests for confidential treatment could become subject to abuse by ILECs and contradict the Commission's well-established pole attachment regulations requiring this information to be publicly available.¹⁸

By the same token, adoption of proposals to reduce the number of ILECs subject to Class A reporting requirements would have severe competitive consequences. Poles and conduits are essential facilities upon which cable systems and other ILEC competitors rely in the provision of service. No alternative regulatory or negotiating scheme exists upon which cable systems or

¹⁷ See *Local Competition and Broadband Reporting*, Report and Order, 15 FCC Rcd. 7717, 7758-60 (2000).

¹⁸ See 47 C.F.R. § 1.1404.

CLECs could depend if the Commission were to eliminate the Class A ARMIS data for any category of local exchange carrier to which the rules currently apply.¹⁹

Moreover, if the current pole-related ARMIS data were no longer required, the number of formal adversarial proceedings would increase exponentially. The Commission and state PUCs would be forced into frequent, often annual, proceedings, with parties submitting extensive filings in support of their views, contravening Congress's directive that the Commission establish a simple, expeditious pleading process and avoid prolonged rate cases.²⁰

In the past, utilities have refused to follow rules requiring that utilities comply with cable operators' requests to produce what should be publicly available account data necessary for calculating pole rents. For example, cable operators in New York were forced to file motions to compel discovery of rate calculation information in a pole attachment rate proceeding.²¹ In another case, during pole rate negotiations with an Illinois ILEC, the ILEC has failed to provide its Continuing Property Report containing information necessary for calculating the proper pole rental rate.²² Although it provided the ARMIS account information that is already public, the

¹⁹ Shifting the collection burden to individual states to collect the ARMIS account information would merely exacerbate the problem. Different states would inevitably devise different account numbers and different mechanisms for attributing the same costs, thereby creating inconsistency and confusion from state to state. In Vermont, for example, a number of utilities do not file FERC account data and the state filing requirements are inconsistent (e.g., expenses normally tracked in FERC Account 593 are often scattered amidst different accounts).

²⁰ See *S. Rep. No. 95-580*, 95th Cong., 1st Sess. at 21 (1977) (stating that it was the desire of the drafters "that the Commission institute a simple and expeditious CATV pole attachment program which will necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation").

²¹ See, e.g., Cable Television & Telecommunications Ass'n of New York, Inc., Memorandum in Support of Motion to Compel, *Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements*, Case 98-C-1357, NY Pub. Serv. Comm'n (filed May 26, 2000).

²² The Illinois Cable Television Association, currently in negotiations with a telephone utility pole owner, requested that the ILEC provide its Continuing Property Report to support its attempt to rebut the Illinois Commerce Commission's 14 foot usable space presumption with a statistically reliable survey. Provision of continuing property records is a standard request when calculating pole rent. Despite the Illinois Commerce Commission's jurisdiction over pole attachments, it has expressly adopted similar pole rental formulas that utilize ARMIS account information. See 83 Ill. Admin Code § 710.1, Uniform System of Accounts for Telecommunications Carriers, Adoption of 47 CFR 32 by reference. See also 83 Ill. Admin. Code § 315.20.

ILEC continues to collect pole rents while keeping secret other critical information on which they have based their pole rents. This example illustrates that where an ILEC is not required to report account data necessary for pole calculations, it often refuses to provide that other essential information. Such behavior by utilities presages the breakdown of the well-functioning FCC formulas in the event the Commission lifted the reporting requirement for pole/conduit related ARMIS accounts. In another instance, after unilaterally imposing a rate increase upon a cable operator in New York, a New York ILEC has refused to negotiate or provide the accounting information necessary to calculate a rate that complies with Commission (both New York Public Service Commission and FCC) precedent and formulas.²³ The ILEC does not meet the size criteria under which annual reports are required to be filed. Actions of this sort demonstrate the steps ILECs may take if ARMIS data were no longer publicly available. Such actions would threaten the breakdown of the well-functioning FCC formulas.

Cable operators have experienced the same problems obtaining essential pole account information from electric utilities. Prior to bringing rate complaints in response to electric utilities' termination of pole attachment agreements and unilateral rate increases in excess of 500 percent, cable operators sought FERC account data and other public information to calculate rates in accordance with the Commission's formulas. Two utilities, Alabama Power Company and Gulf Power Company, refused to provide what should have been publicly-available FERC information, claiming the need for confidential treatment.²⁴ The utilities' requests for

²³ Although New York independently regulates pole attachments, its pole rental formulas similarly rely upon ARMIS account data. *See In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues*, Case No. 95-C-9341, Opinion 97-10, 1997 N.Y. PUC LEXIS 364 (Jun. 17, 1997), *recon. denied*, 1997 N.Y. PUC LEXIS 639 (Oct. 7, 1997) at *19-20. *See also Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements*, Order on Unbundled Network Element Rates, Case 98-C-1357, NY Pub. Serv. Comm'n, 2002 N.Y. PUC LEXIS (Jan. 28, 2002) at *256-62.

²⁴ *Alabama Cable Telecomm. Ass'n v. Alabama Power Co.*, 16 FCC Rcd. 12209 (rel. May 25, 2001), *appeal docketed*, *Alabama Power Co. v. FCC*, Docket Nos. 00-14763-I & 00-15068-D (11th Cir., Sept. 12, 2000)

confidential treatment before the Federal Energy Regulatory Commission were subsequently denied,²⁵ but not before inexcusable delay, expense and cable operators' being forced to execute a confidentiality agreement limiting their use of the information. Another Southern Company utility, Savannah Electric & Power Company, did not even respond to cable operators' information request.²⁶ The FCC strongly criticized these practices in an *Order*.²⁷ Again, these cases illustrate how difficult it is to make a pole attachment regulatory regime operate when it is dependent entirely on discovery, rather than previously filed data.

Without the current reporting requirements for pole/conduit related ARMIS accounts in place, utilities could keep underlying data hidden. This would result in cable operators and other attachers having no other option but to bring suit, unnecessarily incurring costs in an adversarial process and taxing administrative resources. Eliminating or sunseting the current reporting requirements would be the wrong approach in the current regulatory environment.

(finding Alabama Power's pole attachment rate increase from \$7.37 to \$38.81 unlawful and ordering it to refund the amount of over charge); *Florida Cable Telecomm. Ass'n v. Gulf Power Co.*, File No. P.A. 00-004 (filed July 10, 2000) *appeal docketed*, *Alabama Power Co. v. FCC*, Docket Nos. 00-14763-I & 00-15068-D (11th Cir., Sept. 12, 2000) (challenging unlawful pole attachment rate).

²⁵ See *supra* note 16.

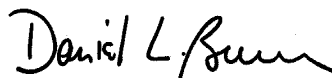
²⁶ See *Comcast Cablevision of Georgia/South Carolina, Inc. v. Savannah Electric & Power Co.*, P.A. No. 02--001, (filed Jan. 14, 2002) (held in abeyance).

²⁷ See *Alabama Cable Telecomm. Ass'n v. Alabama Power Co.*, Order, 15 FCC Rcd. 17346, 17350 (2000) ("*Bureau Order*") (emphasizing that, although the parties had executed a confidentiality agreement, "it is never appropriate to withhold FERC Form 1 data and other essential data from an attacher...").

CONCLUSION

For the foregoing reasons, NCTA urges the Commission to maintain the existing ARMIS accounts to the extent they are used by cable systems and others to calculate pole and conduit rental rates.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Daniel L. Brenner".

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